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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 ROY A. ROGERS,
12 Plaintiff,
13 v.
14 MICHAEL J. ASTRUE, Commissioner of
15 Social Security Administration,
16 Defendant.

CASE NO. C06-5551RJB
ORDER

17 This matter comes before the Court upon the Report and Recommendation of Judge J. Kelley
18 Arnold, United States Magistrate Judge. Dkt. 15. The Court has considered the Report and
19 Recommendation and the remaining record.

20 **I. FACTS**

21 Plaintiff alleges that the Commissioner improperly denied him Social Security Income Disability
22 Benefits. Dkt. 1. Plaintiff filed for benefits on January 17, 2003 (Tr. 96-98) alleging disability since
23 October 15, 2002 (Tr. 96, 314). The procedural and factual history is recounted in the Report and
24 Recommendation, and need not be repeated here. The Report and Recommendation, filed on April 27,
25 2007, recommends upholding the Commissioner's decision. Dkt. 15. No objections to the Report and
26 Recommendation were filed.

27 **II. DISCUSSION**

28 This Court must uphold the Commissioner's determination that the plaintiff is not disabled if the

1 Commissioner applied the proper legal standard and there is substantial evidence in the record as a whole
 2 to support the decision. *Hoffman v. Heckler*, 785 F.2d 1423, 1425 (9th Cir. 1986). Substantial evidence
 3 is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
 4 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Fife v. Heckler*, 767 F.2d 1427, 1429 (9th Cir. 1985).
 5 It is more than a scintilla but less than a preponderance. *Sorenson v. Weinberger*, 514 F.2d 1112, 1119
 6 n.10 (9th Cir. 1975); *Carr v. Sullivan*, 772 F. Supp. 522, 524-25 (E.D. Wash. 1991). If the evidence
 7 admits of more than one rational interpretation, the Court must uphold the Commissioner's decision. *Allen*
 8 *v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).

9 The Commissioner of Social Security has established a five-step sequential evaluation process to
 10 determine whether a claimant is disabled. First, the Administrative Law Judge ("ALJ") will determine if
 11 the claimant is engaged in substantial gainful activity. 20 C.F.R. § 404.1520 (a)(4)(I). A claimant will be
 12 found not disabled if he is engaged in substantial gainful activity. 20 C.F.R. § 404.1520 (b). Second, the
 13 ALJ will determine the severity of the impairment. 20 C.F.R. § 404.1520 (a)(4)(ii). If the claimant does
 14 not have a severe impairment he is not disabled. 20 C.F.R. § 404.1520 (c). In order to have a severe
 15 impairment, a claimant must have any impairment or combination of impairments which significantly limits
 16 their physical or mental ability to do basic work activities. 20 C.F.R. § 404.1520 (c). Third, the ALJ will
 17 examine the severity of the impairment or combination of impairments in order to determine if they meet or
 18 equal one of the listed impairments in the Listing of Impairments found at 20 C.F.R. Pt. 404, Subpt. P App.
 19 1. 20 C.F.R. § 404.1520 (a)(4)(iii), 20 C.F.R. § 404.1520 (d). The ALJ will then determine whether the
 20 impairment or combination of impairments meets the duration requirement. 20 C.F.R. § 404.1520 (d).
 21 Fourth, the ALJ will assess the claimant's Residual Functional Capacity ("RFC") and past relevant work.
 22 20 C.F.R. § 404.1520 (a)(4)(iv). If the ALJ determines that a claimant can perform his past relevant work,
 23 he is not disabled. *Id.* Lastly, the ALJ will assess the claimant's RFC, age, education, and work
 24 experience in order to determine if the claimant can perform any other work that exists in significant
 25 numbers in the national economy. 20 C.F.R. § 404.1520 (a)(4)(v), 20 C.F.R. § 404.1520 (g).

26 Plaintiff assigns four errors to the ALJ's decision to deny him benefits: 1) the ALJ failed to properly
 27 assess his credibility, 2) the ALJ did not adequately consider his treating physician's opinion, 3) the ALJ
 28 did not accurately determine his RFC at step four of the sequential evaluation process, and 4) the

1 Commissioner failed to meet his burden at step five of the sequential evaluation process because the ALJ
 2 did not ask the vocational expert a hypothetical question which included all his limitations, leaving the
 3 vocational expert's testimony regarding other work Plaintiff could perform invalid. Dkts. 11 and 14. This
 4 opinion will address the third argument, improper RFC assessment, and fourth argument, invalid vocational
 5 expert testimony, together.

6 **A. ALJ'S ASSESSMENT OF PLAINTIFF'S CREDIBILITY**

7 The ALJ is responsible for determining credibility, resolving conflicts in the medical testimony, and
 8 resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). If the ALJ's credibility
 9 finding is supported by substantial evidence in the record, the Court does not engage in second guessing.
 10 *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002).

11 “Once a claimant produces objective medical evidence of an underlying impairment, an ALJ may
 12 not reject a claimant’s subjective complaints based solely on a lack of objective medical evidence to fully
 13 corroborate the alleged severity of pain.” *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001)
 14 (*quoting Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991)(*en banc*)). Accordingly, if the ALJ finds
 15 the “claimant’s pain testimony not to be credible, the ALJ ‘must specifically make findings that support this
 16 conclusion’ and the findings ‘must be sufficiently specific to allow a reviewing court to conclude the ALJ
 17 rejected the claimant’s testimony on permissible grounds and did not arbitrarily discredit the claimant’s
 18 testimony.’” *Id.* at 856-57. Where “there is no affirmative evidence that the claimant is malingering, the
 19 ALJ must provide clear and convincing reasons for rejecting the claimant’s testimony regarding the
 20 severity of the symptoms.” *Id.* at 857 (*citing Reddick v. Charter*, 157 F.3d 715, 722 (9th Cir. 1998)).

21 In determining a claimant’s credibility, the ALJ may consider “ordinary techniques of credibility
 22 evaluation,” such as reputation for lying, prior inconsistent statements concerning symptoms, and other
 23 testimony that “appears less than candid,” as well as “unexplained or inadequately explained failure to seek
 24 treatment or to follow a prescribed course of treatment,” and the claimant’s daily activities. *Smolen v.*
 25 *Charter*, 80 F.3d 1273, 1284 (9th Cir. 1996). The ALJ also may consider a claimant’s work record and
 26 observations of physicians and other third parties regarding the nature, onset, duration, and frequency of
 27 symptoms. *Id.*

28 Because the Plaintiff produced objective medical evidence that he suffers from conditions which

1 can reasonably be expected to produce pain or other symptoms, the ALJ was required to analyze the
 2 credibility of his testimony regarding the severity of his symptoms. *Batson v. Comm'r of the Soc. Sec.*
 3 *Admin.*, 359 F.3d 1190, 1196 (9th Cir. 2004).

4 As stated in the Report and Recommendation, the ALJ provided clear and convincing reasons for
 5 rejecting the claimant's testimony regarding the severity of his symptoms. The ALJ noted that Plaintiff had
 6 no additional injuries since he left work and was able to perform at least medium level work in 2002. Tr.
 7 18. The ALJ noted that Plaintiff testified he could only walk an eighth of a mile, but the record indicated
 8 that Plaintiff told Dr. Day that he walked a quarter of a mile every day. *Id.* The ALJ observed that Dr.
 9 Day told Plaintiff to follow a program of regular, daily, aerobic exercise. *Id.* This recommendation from
 10 Plaintiff's treating doctor casts doubt on the extent of disabilities Plaintiff alleged. Lastly, the ALJ found
 11 that Plaintiff's reported activities of daily living, such as shopping, cooking, and some yard and housework,
 12 were inconsistent with his alleged limitations. *Id.* The ALJ did not err in his evaluation of Plaintiff's
 13 credibility.

14 **B. MEDICAL EVIDENCE ASSESSMENT**

15 An ALJ may not reject a treating doctor's opinion without providing specific legitimate reasons
 16 supported by substantial evidence in the record, even if the opinion is contradicted by another doctor.
 17 *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998). “The ALJ can meet this burden by setting out a
 18 detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation
 19 thereof, and making findings.” *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989) (*quoting Cotton*
 20 *v. Bowen*, 799 F.2d 1403, 1408 (9th Cir. 1986)). “When it is an *examining* physician's opinion that the
 21 ALJ has rejected in reliance on the testimony of a non-examining advisor, reports of the non-examining
 22 advisor need not be discounted and may serve as substantial evidence when they are supported by other
 23 evidence in the record and are consistent with it.” *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995)
 24 (declining the plaintiff's invitation to hold that a non-examining medical advisor's statements deserve little
 25 or no weight) (*emphasis in original*).

26 Here, Plaintiff argues that the ALJ failed to properly consider the opinion of his treating physician,
 27 Dr. Day, that he was limited to sedentary work. The ALJ found, based on the evidence in the record, that
 28 Plaintiff suffered from degenerative disc disease. Tr. 21. The ALJ properly reviewed all of Dr. Day's

1 medical reports, noting that her opinion that Plaintiff was limited to sedentary work was based on
2 Plaintiff's subjective complaints. Tr. 18-19. In light of the fact that the ALJ properly assessed Plaintiff's
3 credibility, this was a specific legitimate reason to reject Dr. Day's opinion. The ALJ noted that Dr. Day
4 encouraged Plaintiff to be more active and to participate in physical therapy. *Id.* The ALJ also observed
5 that Dr. Day's opinion was inconsistent with her evaluations and test results. *Id.* Accordingly, the ALJ
6 had specific and legitimate reasons to discount Dr. Day's opinion.

7 **C. RESIDUAL FUNCTIONAL CAPACITY AND THE VOCATIONAL EXPERT'S
8 TESTIMONY**

9 At the fourth step of the sequential evaluation process, the ALJ will assess the claimant's RFC and
10 past relevant work. *See* 20 C.F.R. § 404.1520 (a)(4)(iv). An individual's RFC is what that individual can
11 still do despite his or her limitations. Social Security Ruling ("SSR") 96-8p. The ALJ is responsible for
12 determining a plaintiff's RFC. *Id.* The RFC assessment must be based on all of the relevant evidence in
13 the record, such as "medical history, medical signs and laboratory findings, the effects of treatment, reports
14 of daily activities, lay evidence, recorded observations, medical source statements, effects of symptoms,
15 evidence from attempts to work, need for a structured living environment, and work evaluations if
16 available." *Id.*

17 The ALJ here properly evaluated the Plaintiff's RFC. Plaintiff argues that the ALJ did not
18 adequately consider Dr. Day's opinion and did not properly credit his testimony regarding his limitations,
19 and so did not accurately identify his RFC. As above, the ALJ properly considered the medical evidence in
20 the record and properly assessed his credibility. Accordingly, the ALJ did not err in determining Plaintiff's
21 RFC.

22 Plaintiff also argues that the ALJ failed to include limitations on stooping, crouching, kneeling,
23 crawling and climbing in his RFC and in the hypothetical questions posed to the vocational expert.

24 Hypothetical questions posed to the vocational expert must set out all the limitations and
25 restrictions of the claimant. *Magallanes v. Bowen*, 881 F.2d 747, 756 (9th Cir. 1989). A vocational
26 expert's testimony is only valuable to the extent that it is supported by medical evidence. *Id.* The
27 vocational expert's opinion about a claimant's RFC has no evidentiary value if the assumptions in the
28 hypothetical are not supported by the record. *Id.* An ALJ is free to accept or reject limitations as long as
the decision to do so is supported by substantial evidence in the record. *See Id.* at 756-57.

The ALJ did not err when he concluded that Plaintiff was able to work as an electronics assembler, sales counter clerk, or ticket taker, positions identified by the vocational expert. Even if all the additional limitations Plaintiff urges (stooping, crouching, kneeling, crawling and climbing) were included in his RFC and the hypothetical question to the vocational expert, no change in the result would occur. As stated in the Report and Recommendation, the “jobs identified by the vocational expert in this matter do not involve climbing, balancing, stooping, crouching, or crawling.” Dkt. 15, at 6 (*citing U.S. Dep’t of Labor, Dictionary of Occupational Titles, WL DICT 726.687-010, 249.366-010 and 211.467-030* (4th ed. 1991)(DOT)). Accordingly, the Commissioner met his burden at stage five of the sequential evaluation process.

Here, the Commissioner applied the proper legal standards and there is substantial evidence in the record as a whole to support the decision. The Report and Recommendation should be adopted and the Commissioner's decision denying Plaintiff benefits should be affirmed.

III. ORDER

Therefore, it is hereby **ORDERED** that:

- (1) The Court **ADOPTS** the Report and Recommendation (Dkt. 15);
- (2) The administrative decision is **AFFIRMED**; and
- (3) The Clerk is directed to send copies of this Order to Plaintiff's counsel, Defendant's counsel and Magistrate Judge J. Kelley Arnold.

DATED this 15th day of May, 2007.

Robert J. Bryan
Robert J. Bryan
United States District Judge